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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

TUANJA EDWARD ANDERSON,
CDCR #V-28811,

Plaintiff,

vs.

ALAN HERNANDEZ, Assoc. Warden;
M. STOUT, Captain; R. DAVIS,
Correctional Officer; BUSTOS,
Correctional Officer; HEDDY, Correctional
Officer; S. MILLER, Correctional Officer;
CALIFORNIA DEPARTMENT OF
CORRECTIONS,

Defendants.

Civil No. 15cv0993 BEN (BLM)

ORDER:

**(1) GRANTING MOTIONS TO
PROCEED *IN FORMA*
PAUPERIS AND FOR
DETERMINATION BY
DISTRICT JUDGE
(ECF Doc. Nos. 3, 5)**

**(2) DENYING MOTIONS FOR
APPOINTMENT OF COUNSEL
(ECF Doc. Nos. 2, 11)**

AND

**(3) DIRECTING U.S.
MARSHAL TO EFFECT
SERVICE UPON DEFENDANTS
PURSUANT TO
28 U.S.C. § 1915(d) AND
FED. R. CIV. P. 4(c)(3)**

Plaintiff Tuanja Edward Anderson, currently incarcerated at Salinas Valley State Prison ("SVSP") in Soledad, California, and proceeding *pro se*, has filed a civil rights complaint pursuant to 42 U.S.C. § 1983. (ECF Doc. No. 1.) Plaintiff claims that the California Department of Corrections and Rehabilitation ("CDCR") and

several correctional officials at Richard J. Donovan Correctional Facility failed to provide him reasonable accommodations under the Americans with Disabilities Act, failed to protect him from a cell-mate who sexually assaulted him, and later denied him dental supplies after he reported the incident. (*See* Compl. at 4-6.) He seeks injunctive relief as well as \$15,850,000 in general and punitive damages. (*Id.* at 8.)

Plaintiff filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a). (ECF Doc. No. 3.) In addition, Plaintiff seeks the appointment of counsel (ECF Doc. Nos. 2, 11), and requests that a district judge be assigned to conduct all proceedings pursuant to CivLR 72.3 (ECF Doc. No. 5).

I. Plaintiff’s Motion to Proceed IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee. 28 U.S.C. § 1914(a).¹ An action may proceed despite a plaintiff’s failure to prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if the plaintiff is a prisoner and he is granted leave to proceed IFP, he remains obligated to pay the entire fee in “increments,” *see Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), regardless of whether his action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), prisoners seeking leave to proceed IFP must submit a “certified copy of the trust fund account statement (or institutional equivalent) for the . . . six-month period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the Court assesses an initial payment of 20% of (a) the average

¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14 (eff. Dec. 1, 2014)). The additional \$50 administrative fee does not apply to persons granted leave to proceed IFP. *Id.*

1 monthly deposits in the account for the past six months, or (b) the average monthly
 2 balance in the account for the past six months, whichever is greater, unless the
 3 prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
 4 institution having custody of the prisoner then collects subsequent payments, assessed
 5 at 20% of the preceding month's income, in any month in which the prisoner's
 6 account exceeds \$10, and forwards those payments to the Court until the entire filing
 7 fee is paid. *See* 28 U.S.C. § 1915(b)(2).

8 In support of his IFP Motion, Plaintiff submitted a certified copy of his trust
 9 account statement, as well as a certificate of funds issued by an accounting executive
 10 at SVSP. The Court has reviewed Plaintiff's certificate and his trust account
 11 statements, and they show no average monthly balance, no average monthly deposits,
 12 and no current available funds in his account over the six-month period preceding the
 13 filing of his Complaint.

14 Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed IFP and assesses
 15 no initial partial filing fee. However, the entire \$350 balance of the filing fee owed
 16 must be collected by the CDCR and forwarded to the Clerk of the Court pursuant to
 17 the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

18 **II. Motions for Appointment of Counsel**

19 Plaintiff also filed two separate motions requesting the appointment of counsel
 20 to assist him because he is indigent, in custody, disabled, has limited access to legal
 21 resources, and little knowledge of the law. (*See* ECF Doc. Nos. 2, 11.)²

22 There is no constitutional right to counsel in a civil case. *Lassiter v. Dept. of*
 23 *Soc. Servs.*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1),

24
 25 ² Plaintiff's second motion also requests "equitable tolling" and cites 28 U.S.C.
 26 § 2254(h). (*See* ECF Doc. No. 11 at 1.) Section 2254(h) is inapplicable because
 27 Plaintiff has not filed a habeas petition and his Complaint does not challenge the
 28 constitutionality of his conviction or sentence. Instead, he has filed a civil rights action
 pursuant to 42 U.S.C. § 1983 challenging the conditions of his confinement. A prisoner
 in state custody may not use a section 1983 civil rights action to challenge the "fact or
 duration of his confinement." *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973). He must
 seek federal habeas corpus relief instead. *Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005)
 (quoting *Preiser*, 411 U.S. at 489).

1 district courts have some limited discretion to “request” that an attorney represent an
 2 indigent civil litigant. *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir.
 3 2004). This discretion may be exercised only under “exceptional circumstances.”
 4 *Id.*; see also *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). A finding of
 5 exceptional circumstances requires “an evaluation of the likelihood of the plaintiff’s
 6 success on the merits and an evaluation of the plaintiff’s ability to articulate his
 7 claims ‘in light of the complexity of the legal issues involved.’” *Agyeman*, 390 F.3d
 8 at 1103 (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

9 The Court **DENIES** Plaintiff’s Motions without prejudice because, as
 10 discussed below, it appears Plaintiff is capable of articulating the factual basis for his
 11 claims, and his likelihood of success on the merits is not at all yet clear. Therefore,
 12 neither the interests of justice nor any exceptional circumstances warrant appointment
 13 of counsel at this time. See *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987);
 14 *Terrell*, 935 F.2d at 1017.

15 **III. Screening of Complaint per 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

16 Notwithstanding Plaintiff’s IFP status or the payment of any filing fees, the
 17 PLRA also requires the Court to review complaints filed by all persons and prisoners
 18 proceeding IFP “as soon as practicable after docketing.” 28 U.S.C. §§ 1915(e)(2) and
 19 1915A(b). Under these statutes, the Court must *sua sponte* dismiss any complaint, or
 20 any portion of a complaint, which is frivolous, malicious, fails to state a claim, or
 21 seeks damages from defendants who are immune. *Id.*

22 All complaints must contain “a short and plain statement of the claim showing
 23 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual
 24 allegations are not required, but “[t]hreadbare recitals of the elements of a cause of
 25 action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*,
 26 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
 27 (2007)). “Determining whether a complaint states a plausible claim for relief [is] . . .
 28 a context-specific task that requires the reviewing court to draw on its judicial

1 experience and common sense.” *Id.* The “mere possibility of misconduct” falls short
 2 of meeting this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572
 3 F.3d 962, 969 (9th Cir. 2009). “When there are well-pleaded factual allegations, a
 4 court should assume their veracity, and then determine whether they plausibly give
 5 rise to an entitlement to relief.” *Iqbal*, 556 U.S. at 679; *see also Barren v. Harrington*,
 6 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2) “parallels the language
 7 of Federal Rule of Civil Procedure 12(b)(6)”).

8 However, while the court “ha[s] an obligation where the petitioner is pro se,
 9 particularly in civil rights cases, to construe the pleadings liberally and to afford the
 10 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
 11 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not
 12 “supply essential elements of claims that were not initially pled.” *Ivey v. Bd. of*
 13 *Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

14 As currently pled, the Court finds Plaintiff’s Complaint contains plausible
 15 claims for relief which are sufficient to survive the “low threshold” for proceeding
 16 past the initial *sua sponte* screening.³ *See Wilhelm v. Rotman*, 680 F.3d 1113, 1123
 17 (9th Cir. 2012); *Farmer v. Brennan*, 511 U.S. 825, 832-33, 837 (1994) (Eighth
 18 Amendment requires prison officials to take reasonable measures to guarantee the
 19 safety of inmates, and has been interpreted to include the affirmative duty to protect
 20 prisoners from serious risks of harm); *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th
 21 Cir. 2005) (“Within the prison context, a viable claim of First Amendment retaliation
 22 entails five basic elements: (1) An assertion that a state actor took some adverse
 23 action against an inmate (2) because of (3) that prisoner’s protected conduct, and that
 24 such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5)
 25 the action did not reasonably advance a legitimate correctional goal.”). Accordingly,
 26

27 ³ Plaintiff is cautioned that “the *sua sponte* screening and dismissal procedure is
 28 cumulative of, and not a substitute for, any subsequent Rule 12(b)(6) motion that [a
 defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D.
 Cal. 2007).

1 the Court will direct the U.S. Marshal to effect service upon the Defendants on
 2 Plaintiff's behalf. *See* 28 U.S.C. § 1915(d) ("The officers of the court shall issue and
 3 serve all process, and perform all duties in [IFP] cases."); Fed. R. Civ. P. 4(c)(3)
 4 ("[T]he court may order that service be made by a United States marshal or deputy
 5 marshal . . . if the plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C.
 6 § 1915.").

7 **IV. Conclusion and Orders**

8 Good cause appearing, the Court:

- 9 1. **GRANTS** Plaintiff's Motion to Proceed IFP and his Motion for District
 10 Judge.⁴
- 11 2. **DENIES** Plaintiff's Motions for Appointment of Counsel without
 12 prejudice.
- 13 3. **DIRECTS** the Secretary of the CDCR, or his designee, to collect from
 14 Plaintiff's prison trust account the \$350 filing fee owed in this case by garnishing
 15 monthly payments from his account in an amount equal to 20% of the preceding
 16 month's income and forwarding those payments to the Clerk of the Court each time
 17 the amount in the account exceeds \$10. **ALL PAYMENTS SHALL BE CLEARLY**
 18 **IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.**
- 19 4. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Jeffrey
 20 A. Beard, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001.
- 21 5. **DIRECTS** the Clerk to issue a summons as to Plaintiff's Complaint
 22 (Doc. No. 1) upon Defendants and forward it to Plaintiff along with a blank U.S.
 23 Marshal Form 285 for each Defendant. In addition, the Clerk will provide Plaintiff
 24

25 ⁴ The Court notes that while Plaintiff consents to magistrate judge jurisdiction in
 26 his Complaint, *see* ECF Doc. No. 1 at 8, his Motion requests determination by a district
 27 judge. *See* ECF Doc. No. 3. Because his intentions are not clear, the Court will not infer
 28 Plaintiff's consent to magistrate judge jurisdiction at this time. *See Wilhelm*, 680 F.3d.
 at 1118-21 (discussing circumstances under which consent to magistrate judge
 jurisdiction may be implied). Nevertheless, pursuant to S.D. CAL. CIVLR 72.3(e), the
 assigned magistrate judge will hereafter "conduct all necessary hearings and submit
 proposed findings of fact and recommendations for the disposition of all motions
 excepted from the magistrate judge's jurisdiction by 28 U.S.C. § 636(b)(1)(A)."

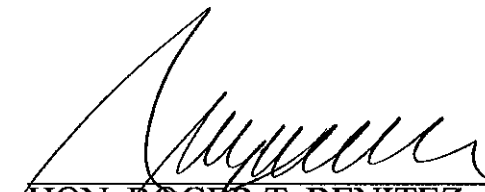
1 with a certified copy of this Order, a certified copy of his Complaint, and the
 2 summons so that he may serve the Defendants. Once he receives this "IFP Package,"
 3 Plaintiff must complete the Form 285s as completely and accurately as possible, and
 4 return them to the United States Marshal according to the instructions the Clerk
 5 provides in the letter accompanying the IFP package.

6 6. **ORDERS** the U.S. Marshal to serve a copy of the Complaint and
 7 summons upon Defendants as directed by Plaintiff on the USM Form 285s provided
 8 to him. All costs of that service will be advanced by the United States.

9 7. **ORDERS** Defendants to reply to Plaintiff's Complaint within the time
 10 provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See*
 11 42 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to "waive
 12 the right to reply to any action brought by a prisoner confined in any jail, prison, or
 13 other correctional facility under section 1983," once the Court has conducted its sua
 14 sponte screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has
 15 made a preliminary determination based on the face on the pleading alone that
 16 Plaintiff has a "reasonable opportunity to prevail on the merits," the defendant is
 17 required to respond).

18 8. **ORDERS** Plaintiff to serve upon Defendants or, if an appearance has
 19 been entered by counsel, upon Defendants' counsel, a copy of every further pleading
 20 or other document he wishes the Court to consider. Plaintiff must include with the
 21 original paper to be filed with the Clerk of the Court, a certificate stating the manner
 22 in which a true and correct copy of the document was served on Defendants, or
 23 counsel for Defendants, and the date of that service. Any paper received by the Court
 24 which has not been properly filed with the Clerk, or which fails to include a
 25 Certificate of Service, may be disregarded.

26
 27 DATED: August 2, 2015

28

 HON. ROGER T. BENITEZ
 United States District Judge